The Procedural Differences Between Litigating in Court and Arbitration: Who Benefits?

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The ongoing debate about the enforceability of pre-dispute agreements to arbitrate employment disputes is colored to a great extent by the perspective from which the parties come.

If one believes that many employers come to work each day bent on exploiting their employees, then one will be inclined to believe that an employer's adoption of arbitration is an unfair tactic to deprive employees of their rights.

If one believes that employers are bent on making a profit, and that they value employees who help them achieve that legitimate business goal, then one is more likely to accept that arbitration has been adopted in good faith, in the interests of all concerned.

As a result of these preconceptions, the debate over arbitration has too often consisted of *ad hominem* attacks on the process, met by *ad hominem* responses. There has not been enough discussion of what practitioners actually experience when litigating claims in arbitration as compared to in court. A brief review of the litigation realities establishes that, contrary to the impression given by those attacking arbitration, arbitration is by no means invariably favorable to the employer.[1] There are real advantages in the arbitration process for employees, and real potential problems for employers.

In this Article, the practical differences between litigation of employment claims in arbitration versus in court are analyzed in the following five contexts: (1) at the pleading stage, (2) during discovery and pre-trial proceedings, (3) at trial, (4) in post-trial proceedings, and (5) generally, in comparison to various miscellaneous goals.

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[1] *E.g.*, Michael Z. Green, *Debunking the Myth of Employer Advantage from Using Mandatory Arbitration for Discrimination Claims*, 31 RUTGERS L.J. 399 (2000); Theodore J. St. Antoine, *Mandatory Arbitration of Employee Discrimination Claims: Unmitigated Evil or Blessing in Disguise?*, 15 T.M. COOLEY L. REV. 1 (1998); Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29 (1998).

I. THE PLEADINGS

A. *Arbitration*

The arbitration process is intended to be informal and inexpensive. Accordingly, pleadings can be short and conclusory with a one-sentence statement of claim being sufficient to initiate proceedings.[2]

B. *Court*

Although much is made of so-called "notice pleading" in court, the reality is that courts maintain and enforce definite pleading standards. If the elements of legitimate causes of action are not included in a complaint, dismissal is likely to follow. Certain claims, such as fraud and defamation, are governed by detailed pleading standards.[3] By contrast, it is the rare arbitration that is dismissed on the pleadings. Arbitrators will often hear non-legal pleas for equity.

C. *Who Benefits?*

The more lenient pleading requirements in arbitration clearly benefit claimants.

II. DISCOVERY AND PRE-TRIAL PROCEEDINGS

A. *Arbitration*

Although discovery procedures vary in each arbitration, generally document discovery in arbitration is quite liberal.[4] The scope of document

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[2] *See* NATIONAL RULES FOR THE RESOLUTION OF EMPLOYMENT DISPUTES, Rule 4(b)(i)(1) (American Arbitration Association), at http://www.adr.org/rules/archives/employment_rules.html (Jan. 1, 1999).

[3] *E.g.*, FED. R. CIV. P. 9(b); N.Y. C.P.L.R. 3016 (McKinney 1991).

[4] *See, e.g.*, NATIONAL RULES FOR THE RESOLUTION OF EMPLOYMENT DISPUTES, Rule 7 (American Arbitration Association), at http://www.adr.org/rules/archives/employment_rules.html (Jan. 1, 1999).

discovery allowed by arbitrators is often as broad as in court, and sometimes more so.[5]

Depositions are more limited in arbitration than in court, and for good reason. Depositions are one of the largest expense items at the pre-trial stage, and arbitration is designed to minimize costs. The complaints of those who raise the lack of depositions as a particular draw back of arbitration ignore what the Supreme Court noted in its *Gilmer v. Interstate/Johnson Lane Corporation* decision.[6] In *Gilmer*, the Court recognized that the lack of rules of evidence at the hearing stage provides a distinct offsetting advantage for employees, as it allows them to put before the arbitrators evidence that would never see the light of day in court.[7]

It bears emphasis that courts, too, are now recognizing the immense cost of depositions, both in terms of diverted management time as well as attorney and court reporter fees. In fact, new amendments to the Federal Rules of Civil Procedure put strict limits on the number of depositions allowed in civil litigation, and the time for each deposition.[8]

While many have expressed concerns about the costs of legal representation for plaintiffs in arbitration, logically this should present more problems in court because plaintiffs with claims that are unlikely to survive pre-trial motions will have trouble getting lawyers to represent them on a contingent fee basis.[9]

In 1995, an American Bar Association Task Force issued a Due Process Protocol for arbitration of employment claims.[10] Many arbitration organizations have adopted the protocol.[11] In at least one respect, the Protocol is more favorable to plaintiffs than court procedures—it permits arbitrators to award legal fees and costs to plaintiffs even if they do not prevail on their statutory civil rights claims.

In addition, while the Due Process Protocol recommends that the costs of the arbitration be shared equally, organizations like the American Arbitration Association (AAA) give arbitrators the right to assess costs in any way they

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[5] For a more detailed discussion of the practical aspects of litigating by arbitration, see *New York Stock Exchange Symposium on Arbitration in the Securities Industry*, 63 FORDHAM L. REV. 1495, 1617–24 (1995) (remarks of Theodore O. Rogers, Jr.).

[6] Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991).

[7] *Id.* at 31.

[8] FED. R. CIV. P. 30(a)(2)(A), 30(d)(2).

[9] Maltby, *supra* note 1, at 43, 57–58.

[10] *Id.* at 39. The Protocol is available on the AAA website at http://www.adr.org/rules/employment/protocol.html.

[11] Maltby, *supra* note 1, at 39.

see fit.[12] The United States Court of Appeals for the District of Columbia Circuit has stated that a pre-dispute arbitration clause may not be enforceable unless the employer bears all of the costs of the arbitrators.[13]

B. *Court*

Pre-trial procedures in court provide a real advantage to corporate defendants in employment litigation because they allow for summary judgment motions. This is a significant advantage to employers because so many employment cases involve grievances by plaintiffs that may have been brought sincerely but that have no real legal basis.[14] Courts readily dismiss cases that, based on the discovery record, raise no material issues of fact.[15]

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[12] NATIONAL RULES FOR THE RESOLUTION OF EMPLOYMENT DISPUTES, Rule 34(d) (American Arbitration Association), at http://www.adr.org/rules/archives/employment_rules.html (Jan. 1, 1999).

[13] Cole v. Burns Int'l Sec. Serv., 105 F.3d 1465, 1484–85 (D.C. Cir. 1997).

[14] *See, e.g.*, Howard C. Eglit, *The Age Discrimination in Employment Act at Thirty: Where It's Been, Where it Is Today, Where It's Going*, 31 U. RICH. L. REV. 579, 637–40 (1997). Eglit reviewed federal district court cases involving age discrimination and found that out of 222 cases decided in 1996 only 125 were decided on the merits and of those 125 69% were decided in favor of the defendant. *Id.* Similarly, Michael Green stated that an "ABA survey of 1,200 ADA decisions between 1992 and 1997 . . . [found] that employers prevail in almost 92% of the disability discrimination cases." Green, *supra* note 1, at 448 n.175 (citing John Parry, *American Bar Association Survey on Court Rulings Under Title I of Americans with Disabilities Act: Study Finds Employers Win Most ADA Title I Judicial and Administrative Complaints*, DAILY LAB. REP. (BNA) No. 119, at D-25 (June 22, 1998)). In addition, Ruth Colker, surveyed ADA court cases decided between 1992 and 1998 and found that

> [d]efendants prevailed in 448 of 475 cases (94%) at the trial court level and in 376 of 448 instances (84%) in which plaintiffs appealed these adverse judgments. Plaintiffs prevailed in 27 of 475 cases (6%) at the trial court level and in 14 of 27 instances (52%) in which defendants appealed these judgments. Of the few cases (14) in which plaintiffs prevailed both at the trial and appellate levels, their rewards were reduced on appeal in 4 of 14 cases (28%). Thus, both the trial and appellate court processes yielded results that were not hospitable to plaintiffs' discrimination claims.

Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L.L. REV. 99, 108 (1999) (citations omitted).

[15] In the *Reeves v. Sanderson Plumbing Prod. Inc.*, 530 U.S 133 (2000), decision, it appeared that the United States Supreme Court tightened the standards for granting summary judgment in employment discrimination cases. In fact, many commentators predicted that as a result of the *Reeves* decision summary judgment would become rare. However, Federal appellate court decisions since *Reeves* have not born those predictions

By contrast, arbitrators often hear claims that have questionable factual or legal basis.

C. *Who Benefits?*

Overall, it is a "toss up" as to who benefits more by the pre-trial proceedings in these fora. Employees can benefit in arbitration from the lesser availability of dispositive motions. Either side can benefit from the fewer depositions available in arbitration, although employers may save more.

III. TRIAL

A. *Arbitration*

The arbitration hearing is generally extremely informal. Without strict rules of evidence, the plaintiff has substantial leeway to bring in all types of evidence.

Empirical evidence demonstrates that plaintiffs prevail more often in arbitration than in court. In a detailed study of employment arbitration in the securities industry, the Securities Industry Association (SIA) compared the results of discrimination cases brought in arbitration before the New York Stock Exchange and the NASD with those brought in the United States District Court for the Southern District of New York.[16] The study showed that the arbitration proceedings were resolved much faster and that the percentage of cases where employees prevailed was far higher than in court.[17] For example, the SIA found that an employee who brought a discrimination claim in arbitration before a Stock Exchange panel was more than twice as likely to prevail in that forum than before a jury, and would receive a decision over a year faster.[18]

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out. *E.g.*, James v. New York Racing Ass'n, 233 F.3d 149 (2d Cir. 2000) (affirming summary judgment in ADEA case); Schnabel v. Abramson, 232 F.3d 83 (2d Cir. 2000) (affirming summary judgment in ADEA case).

[16] Letter from Stuart J. Kaswell, Senior Vice President and General Counsel, SIA, to Mary L. Schapiro, President, SIA (April 25, 1997), *available at* http://www.sia.com/1997_comment_letters/html/nasd97-3.html.

[17] *Id.*

[18] *Id.* Other studies have produced similar results. An AAA survey of employment arbitration cases from 1993–1995 indicated that employees won 63% of the cases. Maltby, *supra* note 1, at 46. By contrast, according to a survey of district court records, in 1994 only 14.9 % of court claims ultimately succeeded. *Id.* (citations omitted).

Critics of arbitration hearings have targeted the arbitrator selection process for particular criticism, making broad and unsubstantiated claims that the pool of arbitrators is less representative than the pool of decision makers in court. Whatever might have been said in the past about that issue, it is clear that the major arbitration bodies are making substantial efforts to broaden the expertise and the diversity of their panels.[19]

B. *Court*

A trial in court, of course, is much more formal than an arbitration hearing. The rules of evidence provide an advantage to the corporate defendant in a great many cases by reining in the plaintiff from introducing broad categories of prejudicial and marginally relevant evidence.

Trials in court have one feature that arbitration obviously does not: the jury. This is the "Holy Grail" for many aspiring plaintiffs in employment cases who are tempted by news accounts of large jury verdicts. A question that needs to be asked before suit, however, is how often the huge verdicts are upheld. Many of the most highly publicized employment verdicts have been reduced or even overturned either on judgment as a matter of law or on appeal,[20] and the empirical evidence demonstrates that most cases never get to trial.[21]

Why is it that employers have concerns about juries in employment cases? Judge Goettel, District Judge of the District of Connecticut observed as follows:

> In the last few years, I have presided over a number of employment discrimination cases with juries. In most of those cases the jury focused on determining whether the adverse employment action (usually discharge) was proper in their opinion. Not surprisingly, since most of them are or have been employees and few of them have been employers, they found that

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[19] Maltby, *supra* note 1, at 40 (describing changes made by the AAA, and noting that the federal judiciary is not particularly representative of the population).

[20] For example, in *Kimzey v. Wal-Mart Stores, Inc.*, 907 F.Supp. 1309, 1312 (W.D. Mo. 1995), *aff'd in part and rev'd in part*, 107 F.3d 568 (8th Cir. 1997), a jury awarded compensatory damages of $35,000 and one dollar in back pay but $50 million in punitive damages in a sexual harassment case. The judge granted a remittitur, reducing the punitive damages to $5 million. *Id.* at 1316. Wal-Mart appealed, and the United States Court of Appeals of the Eighth Circuit further reduced the punitive damages to $350,000. *Kimzey v. Wal-Mart Stores, Inc.*, 107 F.3d 568, 578 (8th Cir. 1997).

[21] In 1994, 60% of discrimination cases in federal court were decided by motions, and these decisions favored employers by an overwhelming 98%. Maltby, *supra* note 1, at 47.

> the employment action was wrong. Having so found, they move on to the conclusion that it must have been due to the type of claimed discrimination—race, sex, religion, national origin or age—even though the evidence supporting that conclusion is very slight. Stated more simply, if the jury finds that the employee should not have been discharged it will "usually" (*i.e.* generally) infer impermissive employment discrimination.[22]

C. *Who Benefits?*

It is not obvious which group benefits more by the hearing process in either forum. Plaintiffs win in arbitration more often, but there appears less likelihood of runaway verdicts in arbitration than there is in court.

IV. POST-TRIAL PROCEEDINGS

In arbitration the availability of appeal is extremely limited compared to court.[23] This is not an advantage for employers, however, unless you assume contrary to evidence that employers always win. Losing employers, just like losing employees, have to live with the fact that there is very little appellate opportunity to challenge an adverse arbitration result.

V. MISCELLANEOUS

There are three goals that either party may value, and in each one arbitration holds an advantage:

1. *Speed*: There is no doubt that arbitration is faster on the whole than court. The SIA study brought that point home graphically.

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[22] Felker v. Pepsi-Cola Co., 899 F.Supp. 882, 891 (D. Conn. 1995).

[23] The Federal Arbitration Act, section 10(a), 9 U.S.C. §§1–16 (1994), provides that an arbitration award may be vacated

> (1) [w]here the award was procured by corruption, fraud, or undue means[;] (2) [w]here there was evident partiality or corruption in the arbitrators, or either of them[;] (3) [w]here the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy, or of any other misbehavior by which the rights of any party have been prejudiced[; and] (4) [w]here the arbitrators have exceeded their powers or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

Id. Under common law precedents, an arbitration award may be vacated if it is in "manifest disregard of the law." Halligan v. Piper Jaffray, Inc., 148 F.3d 197, 202 (2d. Cir. 1998).

2. *Cost*: With fewer depositions and with faster pre-trial procedures, a proceeding tried to judgment is much less costly in arbitration than in court.

3. *Privacy*: It is not true that arbitrations are necessarily confidential. Either party may be able to publicize the fact that the proceeding is going on. Nevertheless, it is usually the case that pleadings in arbitration are not available to the public, and that the hearing is closed as well. It is not necessarily only in the employer's interest that a claim be kept private. Many employees are grateful for the privacy these arrangements provide.

VI. CONCLUSION

There are real advantages for employees in the arbitration process, and employers know it. That is why predictions made by those who opposed pre-dispute arbitration that arbitration would become ubiquitous in the wake of *Gilmer* turned out to be wrong. Nor did it occur, as some speculated, that there were so few remaining court cases that there was a limited amount of published precedent.[24]

What has happened is that litigation in court has become even more expensive. It is no accident that the use of a variety of alternative dispute resolution procedures, such as mediation, is booming. Court procedures simply do not provide an efficient mechanism for resolving disputes.

Given all of the above, why do employers still adopt pre-dispute arbitration agreements notwithstanding the advantages of the procedures to plaintiffs? Business thrives on certainty. Business people value the certainty of knowing in advance how much a case might cost and how long it might last. Arbitration simply is more predictable in those regards.

Court, by contrast, is an expensive wild card. Even when an employer wins, there usually is a significant drain on management time and company resources.

Those who oppose arbitration cloak themselves in the mantle of fairness, but there often is nothing fair to any party about employment litigation in court. Among other things, and as several judges have recently observed, misuse of court procedures by cynical litigants can have deleterious effects on even legitimate employment claims.

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[24] *See, e.g.*, Christine Godsil Cooper, *Where Are We Going with* Gilmer*—Some Ruminations on the Arbitration of Discrimination Claims*, 11 ST. LOUIS U. PUB. L. REV. 203, 214, 219 (1992).

> [N]o federal district court can ignore the wave of dubious and potentially extortionate discrimination cases currently flooding the federal docket. Undoubtedly part of the reason for this flood, which threatens to drown even valid anti-discrimination lawsuits in its wake, is the fact that current law enables such lawsuits to be brought at little or no economic risk to the plaintiffs, since such suits are typically brought on a contingent fee basis, with attorney fees recoverable by prevailing plaintiffs but not by prevailing defendants.[25]

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[25] Kristoferson v. Otis Spunkmeyer, Inc., 965 F. Supp. 545, 548 (S.D.N.Y. 1997) (Rakoff, J.). Other judges have made similar comments:

> It is not enough simply to be a member of a protected class. To invoke the protections of Title VII, an employee must have been subjected to discrimination. A plaintiff who *could* have been subjected to discrimination by virtue of being a member of a protected class, but was not, could reap an unwarranted windfall if her Title VII claim survives summary judgment in the absence of any proof of discrimination. Title VII, an important statute, must not be exploited and diluted as a result of misuse and misapplication by disgruntled employees who happen to be members of a protected class.

Campbell v. Alliance Nat'l Inc., 107 F. Supp. 2d 234, 251 (S.D.N.Y. 2000) (Scheindlin, J.).